
OPINION OF THE PUBLIC ACCESS COUNSELOR

DEXTER BERRY,
Complainant,

v.

MARION POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
18-FC-117

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging the Marion Police Department (“MPD”) violated the Access to Public Records Act¹ (“APRA”). Corporate Counsel Thomas Hunt filed a response on behalf of the MPD. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 29, 2018.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Dexter Berry (“Berry”), an offender incarcerated at Westville Correctional Facility, filed a formal complaint alleging the Marion Police Department (“MPD”) violated the Access to Public Records Act (“APRA”) by improperly denying him access to disclosable public records.

In late July, Berry mailed a public records request to the MPD seeking certain records pertaining to an individual named Devin Wilhide.²

The MPD, through its records clerk Brianna Garr, denied Berry’s request in writing. Garr stated that because Berry was not listed as an involved party in any of the cases involving Devin Wilhide she would not be able to send him arrest charges, incident reports, and the like without a subpoena for the documents from Berry’s lawyer.

As a result, Berry filed a formal complaint with this Office. Berry contends the denial is a violation of APRA, specifically Indiana Code Sections 5-14-3-3(a) and (b); and section 3-5(a) and (c).

On September 11, 2018, attorney Thomas R. Hunt submitted a response to Berry’s complaint on behalf of the MPD to this Office via email.

Essentially, the MPD contends that Berry’s request sought disclosure of records and information that are “specifically excluded from disclosure by [Indiana] Code [Section] 5-

² Berry did not include a copy of the request he submitted to MPD with the formal complaint, but he contends that he requested “all criminal arrest reports such as incident reports [and] narrative reports.”

14-3-4(b)(1),” commonly known as the *investigatory records* exception.

The MPD concluded its response by stating it will, if requested, provide the information required by Indiana Code Section 5-14-3-5.

ANALYSIS

The primary issue in this case is whether the Marion Police Department (“MPD”) had discretion under the Access to Public Records Act, specifically section 4(b)(1), to withhold the records requested by Dexter Berry.

1. The Access to Public Records Act

The Access to Public Records Act (“APRA”) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The Marion Police Department (“MPD”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the MPD’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists

other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

At the outset it is worth mentioning that Mr. Berry did not include a copy of the records request he mailed to the MPD, which led to this complaint. Although Berry states in his complaint narrative that he requested “all criminal arrest reports such as incident reports [and] narrative reports of Mr. Devin Wilhide,” he did not include a copy of the request.

This Office routinely encourages complainants to include a copy of the request that underlies the dispute when seeking an advisory opinion. In order to reach a conclusion about whether an agency has properly withheld a record under the law, it is important to know what public records the person requested. This is probably even more important for offenders who are seeking records while incarcerated. The easiest solution to this problem is to make a copy of the request—even if doing so requires hand writing the request twice—*prior* to sending it out.

MPD should be mindful that under APRA a public agency may deny a written records request if: (1) the denial is in writing...; and (2) the denial includes a statement of the *specific exemption or exemptions* authorizing the withholding of all or part of the public record and the name and title or position of the person responsible for the denial. *See* Ind. Code § 5-14-3-9(d)(emphasis added).

Here, the MPD’s denial did not include a statement of the specific exemption that authorized it to deny the request. Instead, the agency instructed Berry to contact his lawyer to

have a subpoena issued for the records he requested because he was not a party in any of the cases.

Under APRA, certain law enforcement records are categorically disclosable and must be made available for inspection and copying. *See generally* Ind. Code § 5-14-3-5. These records are commonly referred to as a department's daily log. A requestor need not be an "involved party" to inspect & copy these records and certainly does not subpoena.

Even so, APRA provides law enforcement agencies with discretion to withhold the agency's investigatory records. *See* Ind. Code § 5-14-3-4(b)(1). APRA defines *investigatory record* as "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i).

Notably, the records required to be disclosed as part of the daily log are mutually exclusive from *investigatory records* for purposes of APRA. In other words, a law enforcement agency lacks discretion under the law to withhold the daily log as an investigatory record.

Of course, the question is: Which category fits the requested records? This case, like so many before it, illustrates the importance of including a copy of the request when filing a formal complaint. This Office is not willing to conclude a violation of the APRA has occurred in this case because it is not clear what Berry requested.

Toward that end, if Berry revises his request to seek the daily log records, those records need to be released. Nevertheless, this Office recommends that the Marion Police Department do so proactively as a courtesy instead of waiting for a subsequent request.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the Marion Police Department has not violated the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the printed name.

Luke H. Britt
Public Access Counselor